

FOLEY, HOAG & ELIOT

ONE POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109

TELEPHONE (617) 482-1390

CABLE ADDRESS FOLEYHOAG

TELECOPIER (617) 482-7347

TELEX 940693



SDMS DocID 559089

IN WASHINGTON, D C

1615 L STREET, N W

WASHINGTON, D C 20036

TELEPHONE (202) 775-0600

SETH D JAFFE

May 1, 1991

BY HAND

Steven J. Calder, RPM
United States Environmental
Protection Agency
Region I
P.O. Box 5988
JF Kennedy Station
Boston, MA 02114

Superfund Records Center
SITE: Coakley
BREAK: 119
OTHER: 559089

Re: Coakley Landfill Superfund Site;
Booth Fisheries Corporation

Dear Mr. Calder:

I write on behalf of Booth Fisheries Corporation ("Booth") in regard to the Special Notice Letter dated March 29, 1991, issued by the Environmental Protection Agency ("EPA") to Booth in connection with the above-referenced Site.

Since Booth's receipt of the Request for Information submitted under § 104(e) of CERCLA, 42 U.S.C. § 9604(e), Booth has engaged in a thorough investigation in order to identify any possible connection between Booth and the Site. The result of this research, as previously communicated to you, has been that Booth has not identified any information indicating that hazardous substances from the Booth facility were shipped to the Site. Rather, any materials generated at the Booth facility that might arguably have contained hazardous substances were not transported to the Site. Such substances were reused or reclaimed at other locations.

Under EPA's Interim Municipal Settlement Policy, the EPA Office of Solid Waste and Emergency Response has directed EPA Regional offices not to name persons in Booth's situation as PRPs. See Interim Policy of CERCLA Settlements Involving Municipalities or Municipal Wastes, 54 Fed.Reg. 51073 (December 12, 1989) ("Municipal Settlement Policy"):

Steven J. Calder

May 1, 1991

Page 2

Parties who are generators/transporters of trash from a commercial, institutional, or industrial entity will not generally be notified as PRPs if such parties demonstrate to the Region that:

- * None of the hazardous substances contained in the trash are derived from a commercial, institutional, or industrial process or activity; and

- * The amount and toxicity of the hazardous substances contained in the trash does not exceed that which one would expect to find in common household trash.

54 Fed.Reg. at 51075. Since the evidence confirms that no hazardous substances from the Booth facility were sent to the Site, a fortiori the requirements of the Municipal Settlement Policy have been met. The very purpose of the Municipal Settlement Policy is to direct EPA Regional Offices not to name persons as PRPs on the sole basis that EPA has chosen to infer that, over a period of years, some of that person's solid waste must have contained some hazardous substances.

One of the rationales for the policy is that to impose the obligation of proving that MSW contained no hazardous substances on a generator of MSW would be an intolerably difficult burden to meet. Booth has stepped forward with affirmative evidence that it engaged in a careful process of waste segregation which ensured that solid waste generated at its Portsmouth facility did not contain hazardous substances and was, in fact, "similar to the MSW that is derived from households." 54 Fed.Reg. 51074. Therefore, the provisions of the Municipal Settlement Policy regarding commercial, institutional, and industrial establishments are applicable to Booth and Booth formally requests that EPA remove Booth from the list of PRPs at the Site.

At any Superfund site where it is demonstrated that hazardous substances from Booth have been disposed, Booth would work constructively with EPA and other PRPs to reach settlement. Booth remains willing to participate in the PRP Group and in the Special Notice process in order to work towards a settlement, provided that EPA supplies Booth with information which is sufficient to justify naming Booth as a PRP.

In this regard, Booth notes that it requested, pursuant to the Freedom of Information Act ("FOIA"), that EPA provide it with any information which EPA believes supported its decision to name Booth as a PRP at the Site. EPA denied that request on the

ground that such information is subject to the enforcement exemption found at 5 U.S.C. § 552(b)(7); 40 C.F.R. § 2.118(a)(7).¹

Booth does not believe that the enforcement exemption can or should be applied in this matter. The clear goal of the 1986 SARA amendments to CERCLA as well as EPA's stated enforcement policy with respect to Superfund sites is aggressively to pursue settlements, rather than for EPA to perform remedies itself and later sue for cost recovery. Moreover, EPA has also recognized that information exchange with PRPs is critical to achieving settlements.

Given Booth's willingness to participate in settlement negotiations if an adequate basis for naming Booth as a PRP is established, the enforcement exemption is inapplicable and inappropriate. In fact, the reverse is true. Disclosure of the information sought by the Request would facilitate EPA's enforcement policy of encouraging settlements.² In this case, it is EPA Region I's failure to disclose the information which is obstructing settlement.

Regardless of the applicability of the law enforcement exemption under FOIA, disclosure of the information sought in the Request is required under the Resource Conservation and Recovery Act ("RCRA"), the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and EPA regulations.

Section 3007 of RCRA provides that:

Any records, reports, or information ... obtained from any person under this section ... shall be available to the public, except that upon a showing satisfactory to the Administrator ... by any person that records, reports, or information ... if made public, would divulge information entitled to protection under section 1905 of Title 18, such information ... shall be considered confidential....

1-----
1 While EPA produced certain information to Booth as an attachment to the Special Notice letter, Booth does not believe that the attachment provides evidence that hazardous substances from Booth were taken to the Site.

2 Because disclosure of the information would facilitate settlement, it would be in the public interest. Therefore, under 40 C.F.R. § 2.115(a)(3), and (b), the information should be disclosed even if disclosure were not mandatory.

42 U.S.C. § 6927(b)(1). Moreover, EPA regulations state that:

Information will be considered to have been provided or obtained under section[] ... 3007 ... if it was provided in response to a request from EPA made for any of the purposes stated in the Act or if its submission could have been required under those provisions of the Act regardless of whether a specific section was cited as the authority for any request for the information or whether the information was provided directly to EPA or through some third person.

40 C.F.R. § 2.305(b).

Section 104(e)(7) of CERCLA contains language parallel to section 3007 of RCRA. 42 U.S.C. § 9604(e)(7). Similarly, 40 C.F.R. § 2.310(b) also provides that information will be considered to have been provided under § 104 of CERCLA if it could have been demanded under that section, regardless of how EPA actually obtained the information.

The net effect of these provisions of RCRA and CERCLA is to impose a clear duty on EPA, irrespective of provisions of the FOIA, to make available to the public any and all information which EPA obtained or could have obtained pursuant to the information gathering provisions of those acts. The only exemption is for confidential business information; EPA has no independent authority to withhold the information.

EPA has an obligation under FOIA to release the information sought by the Request. Even if the information were exempt from mandatory disclosure under FOIA, release of the information should be made because it would be in the public interest; it would₃ assist in the settlement negotiations with respect to the Site. In addition, EPA has an absolute obligation under both RCRA and CERCLA, notwithstanding any purportedly applicable exemptions from disclosure under FOIA, to make the information sought in the Request available to the public. There is no law enforcement exemption from the information disclosure provisions of RCRA and CERCLA.

For all of these reasons, Booth renews its request that EPA provide any pertinent information concerning Booth's connection, if any, to the Site. This should be considered a formal request under FOIA. A copy of the specific FOIA request is attached for your convenience. Please let me know whether EPA will treat this

3

Disclosure will facilitate settlement if the information disclosed in fact supports EPA's designation of NET as a PRP. If the information fails to link NET to the Site, then EPA's designation of NET as a PRP was improper in the first place.

Steven J. Calder
May 1, 1991
Page 5

as an appeal of Booth's initial FOIA request as a new request. In addition, please also consider this a formal request for any such pertinent information pursuant to § 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and section 3007(b)(1) of RCRA. 42 U.S.C. § 6927(b)(1).

Any continuing failure by EPA to supply information linking Booth to the Site can only have the effect of convincing Booth that no such information exists. Booth's belief that no such information exists is also fostered by EPA's policy encouraging information exchange in order to facilitate settlement. Booth is confident that Region I would see and apply the wisdom in EPA's information exchange policy, if indeed it had any information to exchange.

Booth believes it has established that any hazardous substances which may have been generated at the Booth facility were reused or recycled at locations other than the Site. Moreover, EPA's Municipal Settlement Policy directs EPA Regional offices not to name persons such as Booth, who have sent only MSW to a site. Therefore, Booth respectfully requests EPA to acknowledge that Booth is not a PRP at the Site and to withdraw the Special Notice Letter.

If we can be of any assistance in your consideration of the matters raised in this letter, please call.

Sincerely,



Seth D. Jaffe

cc: Cynthia E. Catri, Esq., EPA
Harley Laing, Esq. EPA
Merrill Hohman, EPA
Charles B. Holtman, Office of the New
Hampshire Attorney General
Steven Stern, Esq., Booth